

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

|                                    |   |                     |
|------------------------------------|---|---------------------|
| In the Matter of                   | ) |                     |
|                                    | ) |                     |
| Regulation of Prepaid Calling Card | ) |                     |
| Services                           | ) | WC Docket No. 05-68 |

**REPLY COMMENTS OF QWEST SERVICES CORPORATION**

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## **SUMMARY**

Qwest strongly disagrees that the Commission's current rules governing the regulation of prepaid calling cards have at any point been uncertain or unclear, or that AT&T's prepaid calling card "variants" raise any new regulatory issues that have not been resolved by the Commission.

Qwest's reply comments stress a critical distinction that many parties appear to be overlooking: combining an information service with a telecommunications service does not transform the nature of the underlying transport, which remains a telecommunications service. It is therefore apparent that even if AT&T's calling card "variants" actually provided enhancements or information on top of an underlying telecommunications service, this would not transform the underlying telecommunications transmission into an "enhanced" service.

It is also clear that neither of AT&T's calling card "variants" represents anything new, and that neither of them qualifies as an "information service." The first AT&T calling card "variant" – which gives users the option to listen to different types of advertising messages, in addition to making calls – is virtually indistinguishable from the AT&T calling card service that was addressed in the Commission's *Order*. It does not matter whether AT&T requires callers to listen to one advertising message or to an entire menu of them, or that the caller is able to use the touch pad on a telephone to select particular advertising messages from this menu. As the Commission has already found, the insertion of a commercial message at AT&T's calling platform does not change the nature of the underlying prepaid calling card service, and it does not transform the call into an "information service." Moreover, the advertising content -- with the option to interact with additional advertising content – is not a true "enhancement" to the telecommunications service which AT&T is offering to callers, and it does not alter the fundamental regulatory analysis.

Regarding AT&T's second "variant" of calling card, Qwest stresses that the Commission has already rejected AT&T's claims that inserting IP transport in the middle of a PSTN-to-PSTN call transforms the call into an "information service." The Commission needs to reject these claims again. There is a sharp difference between true VoIP services and AT&T's calling card "variant," which is not entirely IP-based, does not involve net changes in protocol, and does not offer truly "enhanced" functionalities to end users. Contrary to AT&T's claims, it also makes no functional difference at all whether such a prepaid call is originated by 1+ dialing or by calling an 8YY toll-free number -- the call is still "telecommunications" under the Act and the Commission's prior rulings. Moreover, the Commission has properly rejected AT&T's prior claims that calls to its prepaid calling card platform are not 1+ calls.

Qwest agrees that the Commission should maintain a systematic approach in addressing the regulatory issues raised by prepaid calling cards. There is a real danger that by addressing AT&T's calling card "variants" in isolation, at a time that larger regulatory issues are pending in parallel rulemakings, the Commission would risk creating asymmetries and exceptions in applying Title II regulations. Simultaneously, however, Qwest believes that the resolution of this proceeding should not depend on other rulemakings. The Commission should decide this proceeding using tools that are currently at its disposal – rather than linking it to larger, comprehensive proceedings that will overhaul the intercarrier compensation and USF contribution rules.

Qwest believes the purpose for which a customer buys a prepaid calling card should not be a relevant factor in determining whether it is an enhanced service. An end user's subjective reasons for purchasing a calling card should not determine how the service is regulated. Moreover, an end user's particular use of a service should be irrelevant – as has always been the

case in past Commission decisions. Function – not purpose – should continue to drive these regulatory classifications.

Qwest believes it is unnecessary to examine whether the Commission should claim exclusive federal jurisdiction over some prepaid calls, or whether enhanced services should be subject to the traditional separations analysis. There is no need for these sweeping issues to be addressed in this proceeding.

Lastly, Qwest demonstrates that there is no need for the Commission to craft a special exemption for prepaid calling cards provided to members of the nation's military services. Qwest demonstrates that AT&T is vastly overstating its compliance costs as part of its ongoing effort to politicize this and other proceedings. Moreover, as the Commission has correctly found, there is a competitive marketplace in which service members (and the Pentagon) can readily purchase prepaid calling card services from providers that comply with access charge and USF contribution rules, and whose services are reasonably priced. The true problem is that AT&T has erected a near monopoly on the distribution and use of prepaid calling cards by military service members – and is blocking the use of any competitor's cards.

In conclusion, Qwest strongly encourages the Commission to affirm its prior rulings on access charges, call rating, USF contributions and associated long-standing regulatory classifications. The risk of not doing so is highlighted not just by AT&T's actions as to its own prepaid calling card, but also by AT&T's claims that many other carriers have been failing to pay USF contributions on their prepaid calling card services.

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**REPLY COMMENTS OF QWEST SERVICES CORPORATION**

Qwest Services Corporation (“Qwest”) respectfully submits its response to the initial comments filed in this proceeding. Qwest strongly disagrees with the claims by AT&T Corp. (“AT&T”) and several other parties that the Commission’s current rules governing the regulation of prepaid calling cards have been unclear, or that the prepaid calling card “variants” proposed by AT&T raise any new regulatory issues. The current rules governing the regulation of prepaid calling card services are perfectly clear, and AT&T’s “variants” represent nothing new. For this reason, Qwest disagrees with Sprint, SBC and MCI that this proceeding needs to be linked to larger, comprehensive proceedings that will overhaul the intercarrier compensation and USF contribution rules. To prevent uncertainty and arbitrage, Qwest believes that the Commission simply needs to affirm its prior rulings on access charges, call rating and Universal Service Fund (“USF”) contributions.

**I. COMBINING AN INFORMATION SERVICE WITH A  
TELECOMMUNICATIONS SERVICE DOES NOT TRANSFORM  
THE NATURE OF THE UNDERLYING TELECOMUNICATIONS  
SERVICE**

Before addressing the initial comments filed in this proceeding, Qwest wishes to stress a critical point that was overlooked in many the initial comments filed by the parties to this proceeding. That point is that for purposes of access charges and USF contributions, there is a

clear distinction between telecommunications capacity and the enhancements that ride on top of that capacity.<sup>1</sup> It is also apparent that when a carrier provides an information service using their underlying telecommunications services, the underlying telecommunications still retain their nature as common carrier services.<sup>2</sup> Consequently, it is also clear that even if AT&T is providing enhancements or information on top of an underlying telecommunications service, this piggybacking does not transform the underlying telecommunications transmission itself into an “enhanced” service.<sup>3</sup> For that reason, the “variants” of calling card services raised by AT&T are completely irrelevant to AT&T’s obligations to pay USF and access charges on the underlying telecommunications service that AT&T is providing as a facilities-based common carrier.

AT&T is a highly sophisticated company, and is clearly aware of these distinctions.

However, it is plain that AT&T has found these standards to be both inconvenient and costly. It

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<sup>1</sup> *Accord*, ITTA/NTCA/OPSTCO joint comments at 4 (distinguishing underlying telecommunications service from any incidental enhancements provided by AT&T); *see also In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, 16 FCC Rcd 22745, 22752-53 (2001)(noting distinction between underlying telecommunications services and facilities subject to common carrier regulation under Title II of the Communications Act and the related Title I information services); *see also Federal-State Joint Board on Universal Service; Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing, End User Common Line Charge*, Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318, 5474-75 ¶ 282 (1997)(merely combining telecommunications service with an enhanced service does not automatically “taint” the telecommunications services, thereby rendering the entire package an information service for purposes of applying the USF contribution).

<sup>2</sup> *See In the Matter of The Time Machine, Inc. Request for a Declaratory Ruling Concerning Preemption of State Regulation of Interstate 800-Access Debit Card Telecommunications Services*, Memorandum Opinion and Order, 11 FCC Rcd 1186, 1190-93 (1995)(“*Time Machine*”)(distinguishing basic “long distance calling capability” that is offered to debit card customers from “enhanced” features, and specifically rejecting AT&T claims that its “Teleticket” news and information service offered via prepaid cards is an “enhanced” service rather than a “basic debit card interstate calling capability,” even though the card was used to access enhanced services).

<sup>3</sup> *Accord*, Sprint comments at 11-12 and Verizon comments at 3-4 (citing *Time Machine*).



is therefore trying to subvert them. AT&T has gone to extraordinary lengths in this proceeding – as well as several others – to undermine the distinction between an information service and the underlying telecommunications transmission service below it.<sup>4</sup> In these proceedings, AT&T has taken the position that when a facilities-based common carrier provides an enhanced service or an information service over its common carrier transmission facilities, the entire service becomes an enhanced or information service and is thereby freed from common carrier obligations. AT&T has been pushing this theory in various guises for years – and it has repeatedly been rejected by the Commission.<sup>5</sup>

It has also become clear that in conjunction with these tendentious efforts to change the Commission’s past decisions, AT&T has been bending its compliance with these rules past the breaking point, and has been refusing to pay access charges (or at least the proper access charges) and USF contributions on large amounts of telecommunications traffic.<sup>6</sup> Since many millions of dollars are now at stake, AT&T continues to argue that the Commission’s standards have never been clear, or that AT&T’s avoidance of these regulatory obligations has been proper under the Commission’s Rules. But these claims do not mean that AT&T’s positions have ever been right, nor does it does not mean that the Commission needs to change its standards now.

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<sup>4</sup> See, e.g., *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Petition of AT&T, WC Dkt. No. 02-361 (filed Oct. 18, 2002); see also *AT&T Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, Petition of AT&T, WC Dkt. No. 03-133 (filed May 15, 2003).

<sup>5</sup> See *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457 (2004) (declaring AT&T’s IP-in-the-middle long distance service a telecommunications service); see also *AT&T Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking, WC Dkt. Nos. 03-133 and 05-68, FCC 05-41 (rel. Feb. 23, 2005).

<sup>6</sup> In AT&T’s own words, its decision to treat its prepaid card offerings as “enhanced services” has “generated approximately \$215 million in access savings since the third quarter of 2002, and approximately \$140 million in USF contributions savings since the beginning of 1999.” See AT&T Form 10-Q, filed May 10, 2004, at n. 10.

It is critical that whatever manner the Commission addresses the calling card “variants” proposed by AT&T, the Commission must maintain the distinction between “transport” and “information” – which runs all the way to the Communications Act.<sup>7</sup> With regard to calling card services, this distinction is neither as difficult nor as mysterious as AT&T pretends that it is. When a customer purchases a prepaid calling card at a gas station, or at Wal-Mart, or at a military PX overseas, the customer is paying in advance for a telecommunications service. As Sprint and Verizon correctly point out, the “information” contained in both of AT&T’s calling card variants remains incidental to the telecommunications connection establishing the service.<sup>8</sup> The fact that AT&T provides additional “information” during the course of that connection – or chooses to route the call through IP-based platform in the course of the call – does not change the nature of the underlying telecommunications service.<sup>9</sup> Nor does touching an enhancement or an information service free AT&T from its financial or regulatory obligations for that traffic.<sup>10</sup> As the Commission has made clear, the inclusion of an enhanced component in a service does not

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<sup>7</sup> See U.S.C. § 153(43)(defining “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received”) and 47 U.S.C. § 153(20)(defining an “information service” as the “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information using telecommunications”)(emphasis added); see also 47 C.F.R. § 64.702(a)(defining “enhanced service” as “services, offered over common carrier transmission facilities . . . which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under title II of the [Communications] Act.”)

<sup>8</sup> Accord Sprint comments at 8-10 and Verizon comments at 2-4.

<sup>9</sup> See, *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457, 7465-66 (2004); see also *Federal-State Joint Board on Universal Service; Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, Fourth Order on Reconsideration, 13 FCC Rcd 5318, 5474-75 ¶ 282 (1997).

<sup>10</sup> Accord, Sprint comments at 11; see also Verizon comments at 3-4.

transform the entire service into an enhanced service.<sup>11</sup> Consequently, even if the particular “variants” proposed by AT&T turned its calling card service into an “enhanced” service – and they do not – AT&T and carriers like it would still be obligated to pay access charges and USF contributions on the underlying telecommunications service (which, in this case, is the interstate calling capability that AT&T is providing).

AT&T seems once again to be trying to create confusion where there should not be any. Furthermore, by challenging the Commission to distinguish its “variants” from its other prepaid calling card services, AT&T is plainly trying to obtain reconsideration of the Commission’s recent *Order* in WC Docket No. 03-133<sup>12</sup> as well as the longstanding regulatory standards underpinning the *Order*. In light of the stakes involved, the Commission needs to be clear that it has always made a distinction between telecommunications and information services, and that these distinctions continue to exist, that they have never been unclear, and that they still remain valid. The risk of not doing this is highlighted not just by AT&T’s actions but also by AT&T’s claims that many other carriers have been failing to pay USF contributions on their prepaid calling card services.<sup>13</sup> Unless the Commission is crystal clear in reaffirming its standards, prepaid calling card providers will continue twisting the existing law into a pretzel, padding their calling card services with “enhancements” and gimmicks like IP-routing, and engaging in further evasions and arbitrage.

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<sup>11</sup> *Accord*, WilTel comments at 6 (citing *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 16 FCC Rcd 7418 (2001)).

<sup>12</sup> *See AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, FCC 05-41 (rel. Feb. 23, 2005), *petition for review filed sub. nom. AT&T v. FCC*, Case No. 05-1076, filed March 28, 2005 (D.C. Cir.).

<sup>13</sup> *See AT&T Emergency Petition for Immediate Interim Relief*, WC Dkt. No. 05-68 (filed May 3, 2005), at 4-5.

## **II. THE COMMISSION NEEDS TO MAINTAIN THE INTEGRITY AND CONSISTENCY OF ITS EXISTING RULES**

While Qwest agrees that the Commission should maintain a systematic approach, the Commission should decide this proceeding now, using the tools that are currently at its disposal. At the same time, the Commission should resist linking this proceeding to larger, comprehensive proceedings that will overhaul the intercarrier compensation and USF contribution rules, as some commenting parties have suggested. This is not necessary. Not only has AT&T failed to raise any new issues with its calling card “variants,” the resolution of this proceeding need not and should not depend on other rulemakings. This approach is the best way for the Commission to maintain the integrity and consistency of its existing rules, until such time that the Commission may make comprehensive changes to its intercarrier compensation rules or USF contribution standards in the future.

### **A. A Systematic Approach Is Critical**

The Commission launched this rulemaking claiming it did not want to consider the appropriate regime for different calling cards in a “piecemeal manner.”<sup>14</sup> Qwest believes that this logic needs to be followed one step further – and that the Commission needs to be careful in this proceeding that it maintains the integrity and consistency of its existing access charge and USF rules, as well as its longstanding regulatory classifications.<sup>15</sup> To do this, the Commission needs to affirm these rules pending the outcome of its proceedings examining access charges, enhanced services, and VoIP services.

There is a real danger that by addressing AT&T’s prepaid calling card variants as if they were alone and in isolation, at a time that larger regulatory issues are pending in parallel

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<sup>14</sup> See Notice at ¶38.

<sup>15</sup> Accord, USTA comments at 1-6.

rulemakings, the Commission risks the creation piecemeal, back-door exceptions to Title II regulation that will produce regulatory asymmetries. These asymmetries could then be aggressively exploited in the same manner as AT&T has already done in the context of its IP-in-the-middle call routing.<sup>16</sup>

Qwest agrees with USTA that there should be no loopholes or non-systematic approaches to intercarrier compensation issues.<sup>17</sup> While Qwest favors an eventual overhaul of the Commission's rules governing intercarrier compensation and USF contribution rules, Qwest firmly believes that any changes need to be systematic, and considered on the basis of a full record. Unless and until the existing rules are changed, the Commission must uphold their integrity.

**B. The Commission Should Decide This Proceeding Under Its Current Rules**

While Qwest agrees that the Commission needs to maintain comprehensive and systematic standards, Qwest disagrees with Sprint and SBC and MCI that this proceeding needs to be linked to larger, comprehensive proceedings that will overhaul the intercarrier compensation and USF contribution rules.<sup>18</sup> To the contrary, Qwest thinks that it is essential that the Commission decide the issues raised by AT&T now, under the power of its existing rules and standards, in order to preserve their integrity. As described in greater detail below, Qwest is concerned that delaying a decision would encourage carriers to engage in further arbitrage while

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<sup>16</sup> See USTA comments at 4-5. For example, USTA raises that very strong possibility that if the Commission rules that the “interactive” features in AT&T’s calling card variants makes it an “information service,” it will be a very short time before all types of carriers begin grafting irrelevant “interactive” features on to their services, and will refuse to pay access charges or regulatory assessments on them.

<sup>17</sup> See USTA comments at 4.

<sup>18</sup> See Sprint comments at 4-6; SBC comments at 1-5; MCI comments at 2-3.

these proceedings are pending, at a serious cost to LECs and to the integrity of the USF contribution system.

Similarly, Qwest strongly disagrees with MCI that the issues raised by AT&T cannot be decided at all, due to a lack of clarity in the current rules.<sup>19</sup> This is not true. As Qwest described above, the Commission's current rules and distinctions on access charges and USF contributions are quite clear. Notwithstanding AT&T's attempts to change the rules, the simultaneous noncompliance of AT&T and other carriers does not mean that the rules are unclear, or that deciding the issues raised by AT&T needs to wait on the outcome of other proceedings. .

Qwest strongly disagrees with Verisign's claim that this proceeding is "timely" and a good way to "comprehensively consider the direction of network-based transaction processing systems today."<sup>20</sup> Qwest further disagrees with Verisign's claim that the fact that "the access card business is proliferating into a generic service offering" justifies "independent treatment from the particular kind of service for which the service is used."<sup>21</sup> A comprehensive set of rule changes requires a comprehensive proceeding – not a limited inquiry like this one. And prepaid calling card services should not be regulated in a unique way in the interim. As Qwest has indicated above, settling the regulatory status of AT&T's calling card "variants" does not need to wait for a set of comprehensive reforms and rule changes to take place. Instead, the status of

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<sup>19</sup> See MCI comments at 1.

<sup>20</sup> See Verisign comments at 4-5.

<sup>21</sup> See Verisign comments at 6. If Qwest understands Verisign correctly, Verisign is arguing that prepaid calling cards should be recognized in their own special regulatory category, rather than trying to distinguish different types of calling card services as "telecommunications" or "enhanced" services based on their characteristics. *Id.* at 8. As discussed above, Qwest believes that this sort of complexity is unnecessary – since the prepaid calling card service is fundamentally a telecommunications service, paid in advance, and is the connection on top of which various telecommunications, information or enhancements travel.

AT&T's "variants" can be – and should be– decided under power of the Commission's existing rules.

**C. Ambiguity Or Delay Will Encourage Further Gamesmanship**

Qwest agrees with WilTel and USTA that any ambiguity or delay will only encourage more gamesmanship by unethical carriers, which will continue trying to evade compliance rather than play by the rules.<sup>22</sup> This noncompliance is already harmful to the telecommunications industry and it has been undermining the USF fund – which is already under enormous strain as its demands grow and its contribution base shrinks. Any mixed messages by the Commission will simply cause the problems to continue.

Qwest agrees with Verizon that mere fact that these issues are "open" for debate aggravates the risk that carriers will tweak their phone card offerings to evade access charges and USF contributions.<sup>23</sup> Qwest believes that this risk is particularly acute in light of rising use of IP-based transport for calls. This problem is further highlighted by AT&T's "Emergency Petition for Immediate Interim Relief," which AT&T filed with the Commission on May 3, 2005, in which AT&T revealed a number of additional carriers that AT&T claim are failing to pay USF contributions or proper access charges on their prepaid calling card services.<sup>24</sup> The compliance problem revealed by AT&T's actions is both widespread and extremely serious. The Commission needs to take affirmative steps to correct it now, not later, and to enforce its rules before the evasions swallow compliance.

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<sup>22</sup> See WilTel comments at 2 and USTA comments at 4-5.

<sup>23</sup> See Verizon comments at 7.

<sup>24</sup> See *AT&T Emergency Petition for Immediate Interim Relief*, WC Dkt. No. 05-68 (filed May 3, 2005), at 8-10.

#### **D. Federal Jurisdiction**

Qwest believes that it is unnecessary to examine whether the Commission should claim exclusive federal jurisdiction over some prepaid calls. Qwest agrees with Sprint that there is no need for this sweeping issue to be addressed in this proceeding.<sup>25</sup>

At the same time, Qwest believes that the position of the New York Department of Public Service (“NYDPS”) is premature, and that this proceeding is not the right place to decide whether enhanced services should be subject to the traditional separations analysis.<sup>26</sup> As discussed above, the Commission needs to be wary of making any large policy departures, or of carving out new exemptions or creating new principles that are wider than the issues raised by AT&T’s two calling card “variants.” Qwest is concerned that doing that would later interfere with the Commission’s ability to address industry-wide rules with common, intelligible service distinctions and jurisdictional principles.

#### **E. Purpose And Functionality Based Distinctions**

The Commission has requested for comment on whether the purpose for which a customer buys a prepaid calling card is a relevant factor in determining whether it is an enhanced service or not.<sup>27</sup> Qwest does not believe that it can be or that it should be. It is Qwest’s position that a customer’s purpose for buying a service is irrelevant to that service’s fundamental nature, and that an end user’s subjective reasons for purchasing a calling card should not vary how the service is regulated. An end user cannot change the nature of a regulated service simply through their intent in purchasing it. Moreover, the user’s use of a service should also be irrelevant – as

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<sup>25</sup> See Sprint comments at 15.

<sup>26</sup> See NYDPS comments at 2-3.

<sup>27</sup> See Notice at ¶39.



it always has been in the Commission's past decisions.<sup>28</sup> Qwest believes that function – not purpose – should continue to govern these classifications. Qwest agrees with IDT that purpose-based determinations of this sort – or determinations based on the frequency with which particular functions are used by customers – are also unworkable from a practical standpoint, since they would be virtually impossible to administer.<sup>29</sup>

### **III. IT IS CLEAR THAT NEITHER OF THE CALLING CARD VARIANTS PROPOSED BY AT&T QUALIFY AS AN INFORMATION SERVICE**

#### **A. AT&T Is Once Again Reviving Claims Which The Commission Has Rejected In The Past**

The definition of “telecommunications” in past proceedings is firm. TDM-to-TDM calls are “telecommunications” regardless of routing or technology used in the transmission.<sup>30</sup> Carriers such as AT&T and IDT are offering an unworkable alternative – in which any IP involvement in routing, or any enhancements that travel on top of a telecommunications service, will transform the whole into an “enhanced service.” The Commission has rejected “IP-in-the-middle” as an exception to the intercarrier compensation rules. The Commission's calling card order was entirely consistent with past rulings in both areas.

Having lost these past efforts to carve out special exceptions to the Commission's rules, AT&T is once again challenging the Commission's past rulings, claiming that its “enhanced” calling cards present a “new” set of regulatory issues that have not been addressed before. This

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<sup>28</sup> The Commission has customarily relied on function rather than the perception of end-users when determining the classification of an offering as a telecommunications service *See, e.g., In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11543 (1998)(“The classification of a service under the 1996 Act depends on the functional nature of the end-user offering.”)

<sup>29</sup> *See* IDT comments at 9-10.

<sup>30</sup> *See* Order at ¶¶14-16.

is not the case. AT&T is not raising new issues. Instead, AT&T is launching yet another collateral attack on the integrity of the Commission's rulings, as well as furthering its own litigation agenda.<sup>31</sup>

**B. The First AT&T Calling Card Variant Is Not An “Information Service”**

In the case of AT&T's first “variant” on its prepaid calling card service, customers are given the option of listening to additional information or performing additional functions.<sup>32</sup>

According to AT&T, these are “new capabilities,” and work in the following way:

Like the [enhanced prepaid calling card (“EPPC”)] variant described in the Petition, a cardholder that uses the new EPPC variant dials an 8YY number, is connected to a computer platform, and enters her prepaid card PIN number. At that point, rather than immediately making available a single stored, non-call-related advertising message associated with the card, the computer platform transmits to the cardholder an announcement message that offers several options, such as (i) additional information about the card distributor's business, (ii) additional information about the card distributor's web site, and (iii) additional information about travel, photo processing or other services available from the card distributor.<sup>33</sup>

Reduced to its basics, AT&T is requiring customers to listen to an entire menu of different advertisement in this “variant,” instead of making them listen to a single advertisement. If the caller wishes, they can follow up on this menu by pressing numbers on their keypad, and listening to additional advertisements and commercial tie-ins from the vendor, before the caller finally goes ahead and complete a call. When the caller's chosen option is completed – or if no

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<sup>31</sup> *Accord*, Verizon comments at 2-7; WilTel comments at 1-10; General Communications comments at 2-3.

<sup>32</sup> *See* Notice at ¶38.

<sup>33</sup> *See* Letter from Judy Sello, AT&T, to Marlene Dortch, FCC (Nov. 22, 2004)(“AT&T November 22 Letter”) at 2-3. AT&T specified in a separate letter that it is selling this particular prepaid calling card variant as part of a partnership that AT&T has with Wal-Mart Stores, Inc. *See* Order at ¶11, *citing* Letter from Amy Alvarez, AT&T, to Marlene Dortch, FCC (Nov. 30, 2004).

advertising is selected at all – the caller is then directed to dial the destination number of their call, and at that point AT&T’s platform transmits the advertising message in the same manner as AT&T original prepaid calling card service.<sup>34</sup>

AT&T asserts that this menu of advertisements transforms the prepaid calling card service into an “information service,” since it gives the caller a variety of options and choices in which additional advertising information they can here, and since selecting these options through the touch-pad on their phone will cause the caller to interact with AT&T’s calling platform.<sup>35</sup> AT&T further claims that these options involve the “generating,” “acquiring,” “retrieving,” “utilizing” and the “making available” of “information via telecommunications,” as well constituting a form of “electronic publishing.”<sup>36</sup>

Qwest strongly disagrees with AT&T on all counts. The point of these particular cards is not to “generate” or “acquire” or “retrieve” advertising content from Wal-Mart, much less information of any kind. In reality, this “variant” is no different from the AT&T calling card service that was addressed in the Commission’s Order, and is no different from the “enhancement” claims that the Commission has rejected in the past. The enhancements do not change the nature of the underlying telecommunications.

Fundamentally, it does not matter whether AT&T requires callers to listen to one advertising message or to an entire menu of them. As the Commission has already found, the insertion of a commercial message at AT&T’s calling platform does not change the nature of the underlying prepaid calling card service, and does not transform it calling into an “information

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<sup>34</sup> See Order at ¶11.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 3.

service.”<sup>37</sup> This principle does not vary based upon the style or quantity or presentation of the advertisement messages AT&T provides, which is what is occurring in this “variant.” As the Commission correctly ruled on AT&T’s other prepaid calling card services, the advertising messages the caller hears are incidental to the basic, underlying service offered to the cardholder, and does not in any way alter the fundamental character of the telecommunications service.<sup>38</sup>

It also does not matter that in this “variant” the caller hears a menu instead of a single advertisement, and is able to use the touch pad on a telephone to select particular advertising messages from the menu AT&T provides. This advertising content, with its option to interact with still further advertising content, is not a true “enhancement” to the telecommunications service which AT&T is offering to callers, and its presence does not alter the fundamental regulatory analysis.<sup>39</sup> While AT&T gives the caller the option of listening to individual advertisements, AT&T’s menu of these advertisements is still an involuntary message, and is still interposed before the caller may place their call. There is no “change” in the information or meaningful subscriber interaction between the caller and AT&T.<sup>40</sup> And to the extent that the caller chooses to interact with this menu, and to request additional advertising, these functionalities still do not turn the prepaid calling card into an “information service.” Qwest agrees with USTA that this situation contrasts with the Commission’s prior ruling that a service qualifies as an “enhanced service” only if the additional information provided during the call is

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<sup>37</sup> See Order at ¶16.

<sup>38</sup> *Id.*, citing Time Machine, 11 FCC Rcd 1192-93, ¶ 4 and Non-Accounting Safeguards Order, 11 FCC Rcd at 21958, ¶ 107, and Joint Use Calling Card Order, 7 FCC Rcd at 3531, ¶ 21.

<sup>39</sup> Accord, Sprint Comments at 6-12; WilTel comments at 4-8, Verizon comments at 2-4; USTA comments at 3; ITTA/NTCA/OPASTCO/Western Alliance joint comments at 3-6; NECA comments at 2-3.

<sup>40</sup> Accord WilTel comments at 4-5.

the “essential service provided.”<sup>41</sup> In this case, the “enhancement” being offered by AT&T is still a form of advertising – and the ability to retrieve of this information is still completely incidental to the underlying telecommunications services provided through the cards.<sup>42</sup> AT&T cannot honestly pretend that customers pay a fee to purchase this particular prepaid calling card “variant” with the primary purpose of listening to messages confirming that they purchased the card at WalMart, or to hear additional advertising about the services that Wal-Mart offers. Consequently, nothing that AT&T is proposing here can be or should be distinguished from what the Commission’s prior decisions.<sup>43</sup>

Qwest agrees with NASUCA that there is no evidence that AT&T’s offerings are being marketed as anything other than as a means of making telephone calls.<sup>44</sup> Qwest suggests that AT&T’s claims to the contrary can be resolved by visiting any Wal-Mart that sells the cards and then reviewing what is printed on them, or printed on the cardboard stands from which they are displayed, in order to remove all doubt.

The risks of blurring the distinction between prepaid telecommunications services and the enhancements that ride on top of them are highlighted by MCI’s “Golden Retriever” service. MCI claims that it markets this service to the public as a prepaid gateway to information such as sports scores and weather reports, and provides it via prepaid calling cards.<sup>45</sup> MCI claims that

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<sup>41</sup> See USTA comments at 3, *citing AT&T 900 Dial-It Services and Third Party Billing and Collection Services*, Memorandum Opinion and Order, 4 FCC Rcd 3429, 3431 (1989)

<sup>42</sup> Accord USTA comments at 3; General Communications comments at 7-8

<sup>43</sup> See, e.g., General Communications comments at 7-8, *citing Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, Report and Order and Request for Supplemental Comment, 7 FCC Rcd 3528, 3531 (1992)

<sup>44</sup> See NASUCA comments at 16.

<sup>45</sup> See MCI comments at 4.

these functionalities change the underlying calling card service into a “hybrid” or a “mixed” service, and that the whole should be regulated as an “information service.”<sup>46</sup> In response, Qwest points out that this is an information service component riding on top of a Title II service, as discussed above, and that Title II transport is what people are paying for.<sup>47</sup> Despite MCI’s efforts to inject a third variant into this proceeding, it is clear that the “Golden Retriever” service should not be regulated any differently from AT&T’s first variant.

Qwest would not object if the Commission created rules apportioning the monetary balance of a prepaid calling card for purposes of USF contributions, in the same fashion as the Commission has done for bundled services (such as customer premises equipment). For example, if a customer can access information services through a prepaid calling card, and if the card is not debited when the customer does this, then it is apparent that the calling card is being used only for telecommunications services. In this case, access charges should apply to long distance calls paid for using the calling card and USF contributions should apply to the revenue generated from the sale of the calling card. On the other hand, if the prepaid calling card is debited when the customer accesses information services, then the Commission could use the apportionment rules it already has in place for USF contributions.<sup>48</sup> If the Commission did this, it would affirm that the use of a prepaid calling card for telecommunications services is subject to a USF contribution, as well as reinforce its position that the underlying telecommunications

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<sup>46</sup> *Id.*

<sup>47</sup> *Disagree*, IDT comments at 2-10, which asserts that mixing capabilities transforms the whole into enhanced service. As shown above, IDT is misstating the law.

<sup>48</sup> *See Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules In the Interexchange, Exchange Access and Local Exchange Markets*, Report and Order, 16 FCC Rcd 7418, 7446-49 (2001). Access charges would continue to apply to the long distance calls paid for using the calling card.

call is subject to access charges, which are split between interstate and intrastate jurisdictions as appropriate.

**C. The Second AT&T Variant -- Which Involves “IP-In-The-Middle” Processing Of Calling Card Traffic -- Has Also Been Comprehensively Addressed Before By The Commission**

Under AT&T’s second “variant” of prepaid calling card service, the call is initiated on the public switched telephone network (“PSTN”) using a toll-free 8YY number to AT&T’s calling card billing platform, and thereafter travels “over [AT&T’s] Internet backbone” using Internet protocol (“IP”) transport, after the call.<sup>49</sup> After being initiated on the PSTN and being converted to “an IP format for transport,” the call is then converted back to analog format and it terminates back on the PSTN.<sup>50</sup> AT&T asserts that because of the IP transport component in the middle, the prepaid calling card service is now an “information service.”<sup>51</sup> AT&T further asserts that since this “variant” of prepaid calls is originated by calling a toll-free 8YY number instead of through 1+ dialing, the variant is not governed by the Commission’s recent decision concerning AT&T’s “VoIP-in-the-middle” offerings.<sup>52</sup> AT&T asserts that a number of other prepaid calling card providers are utilizing VoIP processing for their calling card services, and are not paying the proper access charges for this traffic.<sup>53</sup> AT&T therefore asks for clarification.<sup>54</sup>

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<sup>49</sup> See Notice at ¶¶38-41.

<sup>50</sup> See AT&T November 22 Letter, *supra*, at 4.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

In reality, there is nothing that is at all “new” or unsettled about this issue. The Commission has already thoroughly examined AT&T’s claims that inserting IP transport in the middle of a PSTN-to-PSTN call transforms the call into an “Information Service” free from intercarrier compensation obligations or other Title II regulations, and the Commission has thoroughly rejected these claims.<sup>55</sup> Qwest agrees with USTA that this “variant” is nothing more than the equivalent of the AT&T service that was addressed in the Commission’s Order in the VoIP-in-the-middle proceeding – even though that decision was limited to a service that employed 1+ dialing.<sup>56</sup> For these reasons, Qwest believes that it is the VoIP-in-the-middle order – rather than the Commission’s recent decision in the Vonage proceeding – that is fundamentally relevant to this case.<sup>57</sup>

In response to the Commission’s specific questions, Qwest notes that it makes no functional difference at all whether such a prepaid call is originated by 1+ dialing or by calling an 8YY toll-free number. First, as USTA correctly points out, AT&T’s claim that IP-in-the-middle calling card calls are not initiated on a 1+ basis is wrong, since the telecommunications service provided between 1+ dialing to a geographic NXX code and 8YY dialing to a toll-free number is the same.<sup>58</sup> As Verizon, USTA and other parties correctly point out in their comments, it does not matter whether the call initiation goes to a toll number or a toll free

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<sup>55</sup> See *Petition for Declaratory Rulemaking that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457 (2004).

<sup>56</sup> Accord, USTA comments at 5-6.

<sup>57</sup> See *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning the Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004).

<sup>58</sup> USTA comments at 5-6 (pointing out that customers dial toll-free 8YY numbers in place of a geographic NPA simply to provide the originating carrier with billing instructions, so they do not need to pay for the long distance call, and that the 8YY code is therefore simply a substitute for an NXX number in 1+ dialing).



number, since this is still “telecommunications” under the Act and the Commission’s prior rulings – and the Commission has rejected AT&T’s prior claims that calls to its prepaid calling card platform are not 1+ calls.<sup>59</sup> Lastly, NASUCA and WilTel properly distinguish between VoIP services, which are entirely IP-based, involve net changes in protocol, and offer enhanced functionalities to end users, and AT&T’s “variant,” which does none of these things.<sup>60</sup>

It is also clear that if particular dialing protocols and interactions with intermediate billing platforms can change the nature of calls, then the Commission will be fatally undermining its long-standing end-to-end definition of calls.<sup>61</sup> In particular, if AT&T’s arguments were accepted, a typical long-distance call that would ordinarily be subject to the assessment of carrier access charges could be converted to a different compensation scheme simply based on the processing it undergoes on AT&T’s network.<sup>62</sup> This would plainly violate the Commission’s recent VoIP-in-the-middle ruling.

Lastly, Qwest strongly disagrees with IDT’s claim that protocol conversion at any point transforms the underlying transport service into Internet protocol, or that the mere involvement of ability to engage in enhanced services makes for an “enhanced service.”<sup>63</sup> This claim is fundamentally unsound – and as discussed above, it contradicts a long chain of previous rulings by the Commission. IDT’s claims are an advocacy piece, not a reflection of the law as it is.

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<sup>59</sup> See Verizon comments at 6.

<sup>60</sup> See NASUCA comments at 17-18 and WilTel comments at 9.

<sup>61</sup> Accord USTA comments at 5-6; Verizon comments at 4-7; WilTel comments at 8-10; Sprint comments at 14.

<sup>62</sup> See, e.g., Letter from Cronan O’Connell, Qwest, to Marlene Dortch, FCC, in WC Docket No. 04-36 (March 11, 2005), at 3-5 (addressing forbearance petition by Level 3 Communications, LLC).

<sup>63</sup> See IDT Comments at 10-11.

**D. Even If Either Of The AT&T “Variants” Qualified As Enhanced Services, This Would Not Change The Common Carrier Regulation Of The Underlying Telecommunications Services**

Finally, to stress a point that Qwest made above, it should be clear that even if the Commission were to find that AT&T’s calling card “variants” qualify as enhanced services, this does not change the fact that the underlying interstate calling capability that AT&T is providing to customers is a common carrier telecommunications service, and is regulated as such.<sup>64</sup> As the Commission has previously ruled, the inclusion of an enhanced component in a service does not transform the entire service into an enhanced service.<sup>65</sup> Consequently, AT&T and carriers like it are still obligated to pay access charges and USF contributions when they provide telecommunications services on a common carrier basis, regardless of the enhancements that ride on top of these services.

**IV. THERE IS NO NEED FOR A SPECIAL MILITARY EXEMPTION**

The initial comments in this rulemaking demonstrate that there is no need for a specially-tailored exemption for prepaid calling cards provided to members of the nation’s military services. Quite to the contrary, the comments show that this issue continues to be a red herring, which AT&T has continually raised to excuse and shield its years of unlawful and self-interested conduct. Qwest agrees with Sprint and NASUCA that an exemption is unnecessary in the first place.<sup>66</sup> As the Commission has already found, there is a competitive marketplace where service

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<sup>64</sup> See, e.g., Sprint comments at 8-10 and Verizon comments at 2-4.

<sup>65</sup> Accord, WilTel comments at 6 (citing *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 16 FCC Rcd 7418 (2001)).

<sup>66</sup> See Sprint comments at 15-16 and NASUCA comments at 5.

members – and the Pentagon – can readily purchase prepaid calling card services whose providers comply with access charges/USF contributions, and are reasonably priced.<sup>67</sup>

In contrast, the Department of Defense (“DoD”) has made a special request that the Commission grant carriers an exemption from access charges and Universal Service assessments for “all calls [that] originate from military installations and/or the Defense Switching Network.”<sup>68</sup> The DoD claims that without this exemption, service members will face rate increases on their prepaid calling cards, and that this will damage the morale of the troops in the field.<sup>69</sup> It appears that the DoD has been misinformed as to the expense of requiring AT&T to comply with the law. As Qwest demonstrated in its prior filings concerning AT&T’s calling card services, AT&T has vastly overstated its compliance costs as part of its ongoing effort to politicize this and other proceedings, and well as to hitch its illegal actions to a patriotic motive.<sup>70</sup> The cost of paying access charges and USF assessments on AT&T’s military-oriented calling cards would amount to a very small amount of money. For example, AT&T is currently charging service members in Iraq and Afghanistan \$0.21 cents per minute or more for calls back to the U.S.<sup>71</sup> In contrast, terminating interstate access charges currently average approximately \$0.0080 cents per minute – which is less than 4% of the per-minute charge that AT&T is currently collecting from United States troops.<sup>72</sup> These charges could almost certainly be recovered by AT&T on its military-

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<sup>67</sup> See Letter from Gary Lytle, Qwest Senior Vice President - Federal Relations, to Marlene Dortch, FCC, WC Dkt. 03-133 (February 14, 2005)(“*Qwest Ex Parte*”).

<sup>68</sup> See DoD comments at 1-2.

<sup>69</sup> *Id.*

<sup>70</sup> See *Qwest Ex Parte* at 1.

<sup>71</sup> *Id.* at 3. Specifically, AT&T currently advertises that the “promotional rate” for its “Military Exchange 550 Card” for calls between Iraq and Afghanistan and the U.S. is \$0.21 per minute. See <https://thor.aafes.com/scs/default.aspx>.

<sup>72</sup> *Id.*

specific calling cards without substantial rate increases – if any increases were necessary at all. Indeed, since the DoD purchases many of the prepaid calling card services used by the U.S. troops overseas, and distributes the cards to the troops for free, it is not clear that the troops would suffer much out-of-pocket expense, even if their choice of calling card continued to be limited to AT&T’s products.<sup>73</sup>

If there is a really an issue with the nation’s service members having access to “affordable” calling card services, Qwest believes that the true problem lies with AT&T’s monopoly both on card distribution and on call facilities (that block competitor’s products, even when they are given away to service members for free).<sup>74</sup> The fact that DoD has granted AT&T this sort of captive market might well permit AT&T to pass on its compliance costs directly to service members, since they effectively have no alternatives. But the implicit threat that AT&T might do this cannot and should not be used to justify exempting AT&T from complying with the law.

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<sup>73</sup> As Qwest pointed out in this filing, the calling cards used by U.S. troops stationed overseas are heavily subsidized. The DoD purchases calling cards from AT&T and distributes them to troops without charge, at amounts of up to \$40.00 per month. *See Qwest Ex Parte* at 2.

<sup>74</sup> AT&T effectively precludes the troops deployed overseas from using any other carrier’s prepaid calling cards. AT&T has exclusive control of both the retail distribution of calling cards to military personnel and the telephone facilities at which the cards are used. Specifically, AT&T obtained an exclusive seven-year franchise with the Army and Air Force Exchange Service (“AAFES”) to offer its prepaid calling cards for sale at the PXs. AAFES jointly markets the pre-paid cards with AT&T, including promoting them as “the best value when calling home” and disparaging non-AT&T cards are more expensive, without being specific as to the rates. *See* [https://thor.aafes.com/scs/info/faq\\_550.aspx](https://thor.aafes.com/scs/info/faq_550.aspx). In addition, on military posts overseas and on ships, AT&T is the exclusive provider of the “Call Centers” from which service members can place telephone calls. Not coincidentally, these AT&T Call Centers will accept only the AT&T calling cards. *See* Letter from Judy Sello, AT&T, to Marlene Dortch, FCC, WC Dkt. 03-133 (Nov. 8, 2004)(“AT&T Call Centers . . . do not offer the capability to use other providers’ cards.”). As a result, a soldier that tries to use a competitor’s prepaid calling card will have the call blocked.

Lastly, AT&T's claims that its prepaid calling cards are themselves a form of universal service is almost beneath comment – except for the fact that AT&T seems to be angling for a regulatory set-off of its against its past and present USF assessments. The Commission should not allow this. The Commission should not countenance a claim that law-breaking serves the public interest, let alone the claim that illegal acts are patriotic.

In the final analysis, it is clear that the costs of compliance are not as great as AT&T claims that they are, and that inexpensive alternatives to AT&T's calling cards are available – even if AT&T currently makes using these competitor's cards difficult.

## **V. CONCLUSION**

In light of the foregoing, Qwest believes that the Commission should decline to distinguish AT&T's two calling card “variants” from other prepaid calling card services, and should continue to require that AT&T (and other carriers) providing such services pay access charges and USF assessments on the underlying telecommunications transport that is involved. Qwest further stresses that the Commission needs only to affirm its existing standards to make this ruling, and that the issues raised in this rulemaking should not be put off pending a comprehensive review of the telecommunications industry's intercarrier compensation rules.

Lastly, Qwest believes that it is plain that there need be no military-specific exemption from these rules for AT&T or any other calling card provider.

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May 16, 2005

CERTIFICATE OF SERVICE

I, Ross Dino, do hereby certify that I have caused the foregoing **REPLY**  
**COMMENTS OF QWEST SERVICES CORPORATION** to be 1) filed with the FCC  
via its Electronic Comment Filing System, 2) served, via email on Tamara Preiss, Pricing Policy  
Division, Wireline Competition Bureau at [Tamara.Preiss@fcc.gov](mailto:Tamara.Preiss@fcc.gov), 3) served, via email on the  
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via first class United States Mail, postage prepaid, on the parties listed on the attached service  
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